IN THE

Supreme Court of the United States

October Term, 1963.

No. 77.

HAROLD A. ROSEN, REGIONAL DIRECTOR, TWELFTH REGION, NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

THE GREYHOUND CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR THE GREYHOUND CORPORATION, RESPONDENT.

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BRIEF FOR THE GREYHOUND CORPORATION, RESPONDENT.

The brief for the Regional Director of the National Labor Relations Board ("the Board") correctly states the Opinions Below and Jurisdiction.

STATUTES INVOLVED.

In addition to the provisions of the National Labor Relations Act, as amended, set forth in the Appendix to the Board's brief, the respondent ("Greyhound") sets forth in the Appendix hereto, *infra*, p. 41, Sections 10(j) and 10(l) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U. S. C. 160(j) and 160(l)) and the relevant provision of the Judicial Code (62 Stat. 931, 28 U. S. C. 1337).

QUESTION PRESENTED.

Where a decision of the National Labor Relations Board shows on its face findings which, as a matter of law, establish absence of jurisdiction over a party, does a district court have jurisdiction to enjoin further proceedings with respect to such party?

STATEMENT OF THE CASE.

The Greyhound Corporation ("Greyhound", plaintiff in the District Court, appellee in the Court of Appeals, and respondent herein), is a Delaware corporation engaged in interstate motor carriage (R. 1) [1] and operating terminal facilities at numerous locations, including Jacksonville, Miami, Tampa and St. Petersburg, Florida (R. 45). Floors, Inc., of Florida ("Floors"), is a Florida corporation and a wholly owned subsidiary of Floors, Inc., of Georgia. Floors is engaged in the business of furnishing clean-up, building maintenance, and other allied services to varied customers throughout Florida, including the four Greyhound terminals referred to above (R. 42). Of at least 384 persons employed by Floors in Florida at the time the petition for representation was filed, a total of only 63 work part or full time at Greyhound Terminals in Florida (R. 42).

Floors furnishes its services on a fixed price or cost-plus basis to all customers (R. 43). Greyhound and Floors have no common identity, are not a single or joint entity, have no common directors, stockholders, or officials, and there is no mutuality of operating control (R. 9, 47).

On April 17, 1961, Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, AFL-CIO ("Union"), filed a petition with the National Labor Relations Board ("Board"), seeking to be certified

1. R., as used herein, refers to the printed Transcript of Record.

as the representative for collective bargaining for "all porters and maids located in the Greyhound Corp. bus terminals at Miami, St. Petersburg, Tampa and Jacksonville, Florida." Said petition gave the name of the employer as "Floors, Inc." (R. 65). On May 25, 1961, the Union filed an amended petition, seeking to represent the same unit described in the original petition, and gave the name of the employers as "Southeastern Greyhound Lines, and Floors, Inc." (R. 66).

Upon the hearing on the petitions, Greyhound vigorously asserted and adduced evidence in support of its contention that it was not the employer of the persons comprising the proposed unit (R. 5).

By Decision and Direction of Election dated May 3, 1962 (R. 9-11), the Board directed the Regional Director ("Board", defendant in the District Court, appellant in the Court of Appeals, and petitioner herein) to conduct an election no later than 30 days from May 3, 1962 among:

> "All porters, janitors and maids working at the Greyhound Corporation's bus terminals in Miami, St. Petersburg, Tampa and Jacksonville, Florida, excluding all other employees of the Greyhound Corporation and Floors, Inc. of Florida." (R. 9-10)

The Board's decision found both Greyhound and Floors to be the "joint employer" of the persons in the above described unit (R. 9-10). In support of this finding the Board found:

> "It appears that Floors hires, pays, disciplines, transfers, promotes and discharges the porters, janitors and maids. However, it also appears that Greyhound's terminal managers confer with Floors' supervisors in setting up work schedules and in determining the number of employees required to meet those schedules. Moreover, it also appears that Floors' supervisors may visit the Greyhound terminals on an irregular

basis and on occasion may not appear for as much as two days at a time; and that the employees sought, including porters in handling baggage, receive work instructions from Greyhound terminal officials. In addition, the record also shows that Greyhound, on one occasion, prompted the discharge of a porter whom it felt to be an unsatisfactory employee. In view of the common control over the employees sought, we find both Greyhound and Floors to be their joint employer." (R. 10)

There is no finding that Greyhound has any right, control, or authority to bargain collectively with the persons in the unit "in respect to rates of pay, wages, hours of employment, or other conditions of employment." (Section 9(a) of the Act, P. A. 34.[2])

Member Rodgers dissented, stating:

"On the basis of the record herein, I would find that the employees sought are employees of Floors, that Floors is an independent contractor, and that the only appropriate unit is one comprised of all of Floors' employees in the above-described localities. Accordingly, I would dismiss the petition." (R. 10)

Following the Board's Decision and Direction of Election, the Board proceeded to arrange for the election on either May 28 or May 29, 1962, but no later than June 1, 1962 (R. 12-15). Whereupon, Greyhound filed the complaint in the instant case, and exhibits thereto (R. 1-41), seeking an injunction against the effectuation of the Board's Decision and Direction of Election, the said Decision and Direction of Election being in excess of the Board's delegated powers, contrary to the provisions of the Act, and violative of Greyhound's rights under the Act.

In support of the complaint, Greyhound filed two affidavits, neither of which was controverted by counter-

2. P. A., as used herein, refers to the Appendix to petitioner's brief.

affidavit or otherwise. One affidavit is that of an officer of Floors (R. 42-44); the other by the regional manager of Greyhound (R. 45-47), the latter, inter alia, swearing to the allegations of the complaint (R. 47). These affidavits not only show that Floors "hires, pays, disciplines, transfers, promotes and discharges the porters, janitors and maids", but also show that Floors withholds income taxes, pays workmen's compensation, unemployment compensation and social security on these employees; owns and furnishes all supplies and equipment used by its employees; determines hours of work, assigns, supervises, and determines all labor policy with regard to these employees (R. 43-44, 46-47). Many other factors demonstrating Floors to be the sole employer of the employees are set forth in the affidavits.

The contracts between Greyhound and Floors (R. 19-34) also show the independent contractor relationship, as does an order of Honorable Bryan Simpson, United States District Judge for the then Southern District of Florida, entered July 27, 1955 (R. 35-41), in an action between Greyhound and the Union regarding the effect of the contract between Greyhound and Floors.

The District Court issued a temporary restraining order on May 24, 1962 (R. 48-50), and an order extending the same for ten days (R. 51).

The Board filed a motion to dismiss, or, in the alternative, for summary judgment (R. 63-64), on the grounds that the District Court is without jurisdiction of the subject matter; that the District Court lacks jurisdiction of the members of the Board, who are indispensable parties; that the action is premature; and that the complaint fails to state a claim warranting relief.

The cause came on for hearing and, there being no issues of fact, the Board's motions were denied and a permanent injunction issued. The District Court made extensive findings of fact and conclusions of law, including, inter alia, that the employees involved are solely the em-

ployees of Floors and not of Greyhound; that, with regard to representation proceedings, the Board is prohibited by the provisions of the Act from conducting an election wherein Greyhound is a party-employer with regard to persons who, under the Act, are not its employees; that Section 9 of the Act expressly contemplates representation proceedings only as regards the employer of the employees comprising the unit found to be appropriate by the Board. The District Court made findings of fact and conclusions of law supporting the denial of each contention of the Board (R. 53-59, 205 F. Supp. 686, et seq.).

From the Final Decree for Permanent Injunction and Memorandum Opinion, filed June 12, 1962, the Board appealed (R. 60-62).

Upon appeal, the United States Court of Appeals for the Fifth Circuit filed a per curiam opinion, entered November 21, 1962, affirming the District Court (R. 71, 309 F. 2d 397) and entered its judgment thereon on December 19, 1962 (R. 72).

This Court granted the Board's petition for writ of certiorari (R. 73).

SUMMARY OF ARGUMENT.

The power of the Board is circumscribed by the authority granted by Congress. The Congress has deprived the Board of authority to determine that one is an employer where another hires, pays, disciplines, transfers, promotes and discharges the employees in the unit deemed appropriate for collective bargaining. This limitation is contained in the legislative history of the 1947 amendment to Section 2(3) of the Act, which excludes "independent contractors" from the term "employee". The legislative history shows the Congress intended that the historical common-law tests used to determine an independent contractor relationship also be used to determine an employer-employee relationship; and that the social and economic purposes of the Act be disregarded in mak-

ing the determination. The Board's own findings of fact, in the present case, preclude a legal conclusion that Greyhound is an employer in the premises. Therefore, the Board has no jurisdiction over Greyhound.

Congress has vested the District Courts of the United States with original jurisdiction of any civil action arising under any Act of Congress regulating commerce, such as the National Labor Relations Act. That jurisdiction includes the power to enjoin and vacate administrative determinations made in excess of statutory authority. In providing a limited means of obtaining review of a representation determination through the tedious and uncertain method of reviewing an unfair labor practice order, the Congress has not precluded judicial intervention where the Board has acted without statutory authority.

The judicial proceeding in the present case is to stop the Board from violating Greyhound's right not to be a party in a proceeding in which Greyhound is not an employer. The Board's error of statutory construction reflected on the face of the Board's Decision and Direction of Election, is a final determination because there are no further administrative remedies to exhaust.

Remedy by way of an original action is no less available to an employer than to a union, because there is no basis for a distinction. This is particularly true since the 1947 amendments to the Act make both unions and employers subject to unfair labor practice charges.

Leedom v. Kyne, 358 U. S. 184, supports district court jurisdiction in the present case. In both cases, the Board had acted in excess of its statutory authority. The union, in *Kyne*, could have pursued the statutory review procedure. In the present case, Greyhound could have pursued that procedure. In neither case, was the review procedure adequate or exclusive.

McCulloch v. Sociedad Nacional, 372 U. S. 10, clearly enunciates the principle that a district court has jurisdiction to enjoin a representation election in a case wherein the Board does not have jurisdiction.

ARGUMENT.

Introduction.

As a predicate for the detailed argument that the District Court had jurisdiction in the present case, the statutory elements which pervade the entire problem are briefly described.

The existence of an employer-employee relationship is an absolute condition precedent to a representation proceeding under the Act. Absent that relationship, there is no jurisdiction in the Board.[3]

The Board derives its statutory authority in representation matters from Section 9 of the Act (P. A. 34-36), which clearly provides that a representation proceeding leading to election and/or certification is limited to a proceeding between the representative of employees and the employer of those particular employees. Where the employment relationship exists under the Act, it exists for purposes of collective bargaining as provided in Section 9(a) (P. A. 34). The subject matters of collective bargaining as defined in Section 9(a) are "rates of pay, wages, hours of employment, or other conditions of employment . . .". The consequence of an employer's refusal to bargain with the duly designated and selected representative of *his* employees is the prosecution of an unfair labor practice charge pursuant to Section 8(a)(5) of the Act (P. A. 34).

Section 2(3) of the Act (P. A. 33) does not define the term "employee" except by way of certain exclusions and certain inclusions. The Congress amended Section 2(3) of the Act in 1947 to prohibit the Board from classifying

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3. *National Labor Relations Board v. Interior Enterprises, Inc.*, (9 Cir. 1961) 298 F. 2d 147, 150; *Hearst Publications, Inc. v. National Labor Relations Board*, (9 Cir. 1943) 136 F. 2d 608, 611; *United Insurance Co. of America v. National Labor Relations Board*, (7th Cir. 1962) 304 F. 2d 86.

persons as employees who did not work for hire for the person alleged to be the employer.[4]

What the Board did in the present case was to make findings of fact on the face of its Decision and Direction of Election which, under the legislative history referred to above, precluded a legal conclusion that Greyhound was an employer with regard to the employees in the proposed unit. The Board undertook to proceed further with respect to Greyhound, although it had no jurisdiction to do so.

Thus, the situation in the present case is analogous to a hypothetical case in which the Board would make findings of fact, not disputed, that an employee possesses the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, etc., and yet would make a determination that such employee was not a supervisor. Section 2(3) of the Act (P. A. 33) excludes from the term "employee" any individual employed as a supervisor. Section 2(11) of the Act defines the term "supervisor".[5]

In the present case, the Board's Decision and Direction of Election followed a hearing and was *final*, in that there exists no further opportunity for administrative review of this determination. The District Court had statutory jurisdiction[6] to enjoin the Board from proceeding beyond the scope of its jurisdiction.

No decision of this Court and no congressional history with reference to the limited review provisions of the

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4. Section 2(3): "the term 'employee' . . . shall not include . . . any individual having the status of an independent contractor . . ." The legislative history is set forth at length under specific argument on this point, *infra*, pages 10, 11. See also, *National Labor Relations Board v. Steinberg*, 182 F. 2d 850, 854; *Site Oil Company v. National Labor Relations Board*, 319 F. 2d 86.

5. "(11) The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

6. 28 U. S. C. 1337, *infra*, p. 42.

National Labor Relations Act[7] directly or by inference forecloses jurisdiction in the District Court in the present case. Where, as in the instant case, the Board did not have jurisdiction, no part of the National Labor Relations Act has further application to the proceedings, including the statutory review provisions of Sections 10(e) and (f).

I.

The Board Acted Beyond Its Statutory Authority and Without Jurisdiction.

The congressional intent in amending Section 2(3) of the Act in 1947, so as to exclude from the term employee "any individual having the status of an independent contractor" (P. A. 33), was to require the Board and the courts, in interpreting and applying the Act in representation cases, to give the term "employee" the recognized judicial meaning of that term as historically used, without regard to the social and economic purposes of the Act. When established legal concepts are applied to the findings of fact stated in the Board's Decision and Direction of Election, the legal conclusion is required that Greyhound is not an employer in the present case.

A. *Congressional Intent.*

In enacting amended Section 2(3) of the Act, the Congress clearly expressed its intent as the same is reflected in the legislative history.[8] From the legislative his-

7. Section 10(e) and (f) (P. A. 36-38).

8. The House Committee Report reads, in part, as follows: "An 'employee', according to all standard dictionaries, according to the law as the courts have stated it, and according to the understanding of almost everyone, with the exception of members of the National Labor Relations Board, means someone who works for another for hire." But in the case of *National Labor Relations Board v. Hearst Publications, Inc.*, (322 U. S. 111 (1944)), the Board expanded the definition of the term 'employee' beyond anything that it ever had included before, and the Supreme Court, relying upon the theoretic 'expertness' of the Board, upheld the Board. In this case the Board

tory it was unquestionably the intent of Congress to nullify this Court's ruling in the *Hearst* case, cited in the legislative history. As was stated in *United Insurance Company of America v. National Labor Relations Board,* (7 Cir. 1962) 304 F. 2d 86:

> "It is conceded the amendment was intended by Congress to nullify the Supreme Court ruling in *National Labor Relations Board v. Hearst Publications, Inc.*, 322 U. S. 111, 64 S. Ct. 851, 88 L. Ed. 1170."

The congressional intent was not merely to exclude independent contractors from the definition of the term "employee", but was to furnish to the Board and to the courts a basis for determining when the employer-employee relationship exists and when it does not exist. In the *Hearst* case, this Court recognized that the so-

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held independent merchants who bought newspapers from the publisher and hired people to sell them to be 'employees'. The people the merchants hired to sell the papers were 'employees' of the merchants, but holding the merchants to be 'employees' of the publisher of the papers was most far reaching. It must be presumed that when Congress passed the Labor Act, it intended words it used to have the meanings that they had when Congress passed the act, not new meanings that, 9 years later, the Labor Board might think up. In the law, there always has been a difference, and a big difference, between 'employees' and 'independent contractors'. 'Employees' work for wages or salaries under direct supervision. 'Independent contractors' undertake to do a job for a price, decide how the work will be done, usually hire others to do the work, and depend for their income not upon wages, but upon the difference between what they pay for goods, materials, and labor and what they receive for the end result, that is, upon profits. It is inconceivable that Congress, when it passed the act, authorized the Board to give to every word in the act whatever meaning it wished. On the contrary, Congress intended then, and it intends now, that the Board give to words not far-fetched meanings but ordinary meanings. To correct what the Board has done, and what the Supreme Court, putting misplaced reliance upon the Board's expertness, has approved, the bill excludes 'independent contractors' from the definition of 'employee'." H. Rep. 245, 80th Cong., 1st Sess., p. 18. Vol. 1, Legislative History of the Labor-Management Relations Act, 1947, page 309. The Conference Report follows the House Committee Report. H. Rep. 510, 80th Cong., 1st Sess.; U. S. C. Cong. Serv. 80th Cong., 1st Sess., p. 1138.

called "common-law standards" for determining when one is an employee are the same "common-law standards" used to determine when one is an independent contractor (322 U. S. at 120). However, in *Hearst*, this Court determined that Congress had not used the word "employee" as a term of art having a definite meaning, but that Congress had in mind at least some other persons than those standing in the proximate legal relationship of employee to the particular employer involved in a labor dispute (322 U. S., at 124). This Court based its determination upon the social and economic purposes of the Act (322 U. S., at 126-130. This Court's decision in *Hearst*, nullified by the 1947 amendment to the Act, as clearly shown in the legislative history, had reversed *Hearst Publications, Inc. v. National Labor Relations Board*, (9 Cir. 1943) 136 F. 2d 608. In that case, the Ninth Circuit held that the legislature is presumed to use words in their ordinary sense unless that sense is contradicted by the context of a statute, and stated:

> "The dictionary definition of 'employee' is 'one employed by another; one who works for wages or salary in the service of an employer,' Webster's New International Dictionary, 2d Ed. 1937."

B. *As a Matter of Law, Greyhound Is Not an Employer.*

The Decision and Direction of Election in the present case shows on its face findings of fact clearly demonstrating that only Floors, and not Greyhound, is the employer. These findings show that Floors hires, pays, disciplines, transfers, promotes and discharges the porters, janitors and maids (R. 10; this brief, *supra*, p. 3). One who possesses these authorities and exercises them is the employer.[9]

9. *United States of America v. Silk*, (1947) 331 U. S. 704; *Greyvan Lines, Inc. v. Harrison*, 331 U. S. 704; *National Labor Relations Board v. Steinberg*, (5th Cir. 1950) 182 F. 2d 850; *National Van Lines, Inc. v. National Labor Relations Board*, (7 Cir. 1960), 273 F. 2d 402.

Moreover, it is clear from the record before this Court, specifically including the contracts between Greyhound and Floors (R. 16-34) and the order and findings of fact of Judge Simpson, construing the contract between Greyhound and Floors (R. 35-41), that the relationship between Greyhound and Floors is that of owner and independent contractor. A basic element of an independent contractor relationship is that where the independent contractor employs employees to perform the contracted services, the employees are his employees and not those of the owner.[10] The fact that the owner[11] possesses or exercises a degree of control to see to the ultimate performance of the contract in no way makes the owner an employer of the employee of the independent contractor. This Court stated, in *National Labor Relations Board v. Denver Building and Construction Trades Council, infra,* that the fact that the contractor had some supervision over the subcontractor's work did not eliminate the status of each as an independent contractor or make the employees of one the employees of the other (341 U. S., at 688-690). In *United States v. Silk, supra,* this Court stated, at 331 U. S., page 714:

> "There is no indication that Congress intended to change normal business relationships through which one business organization obtained the services of another to perform a portion of production or distribution."

In *Hearst Publications, Inc. v. National Labor Relations Board, supra,* the Ninth Circuit found that sub-

10. *National Labor Relations Board v. Denver Building and Construction Trades Council,* (1951) 341 U. S. 675, 687-690; *Greyvan Lines, Inc. v. Harrison,* 331 U. S., at 712; *United States v. Silk,* 331 U. S., at 712; *Greyvan Lines, Inc. v. Harrison,* (7 Cir. 1946) 156 F. 2d 412: *National Van Lines, Inc. v. National Labor Relations Board,* (7 Cir. 1960), 273 F. 2d 402; *National Labor Relations Board v. Carroll,* (1 Cir. 1941) 120 F. 2d 457.

11. The term "owner", as used in this brief, refers to the person engaging the services of the independent contractor.

stantial control in the owner over the end result performed by the employees of the independent contractor was insufficient to constitute the owner the employer of the employees of the independent contractor under Section 2(3) of the Act, even prior to the 1947 amendment of that section.

In *Williams v. United States*, (7 Cir. 1942) 126 F. 2d 129, a case involving liability for social security taxes, the Court was confronted with the question of whether a band leader was an independent contractor and thus the employer of the musicians in his band, or whether each establishment which employed the band by contract with the band leader was the employer. At page 133, the Court held:

> "We have already concluded, not inconsistent with the findings of the court below, that the establishments had no right to hire or discharge members of the orchestra. To our mind, this circumstance alone comes near being decisive. It is difficult to conceive of an employer-employee relationship without such a right on the part of the employer. It is equally inconceivable that such right should rest solely in the hands of the employee. Without this right there could be no effective control by an employer. As was said in Pioneer Construction Co. v. Hansen, 176 Ill. 100, 108, 52 N. E. 17, 19: '* * * and, inasmuch as the right to control involves the power to discharge, the relation of master and servant will not exist unless the power to discharge exists. * * *.'"

And in the same case, the Seventh Circuit, in discussing the fact that the District Court had made much of numerous findings of control on the part of the establishments hiring the band, said, at page 131:

> "For aught that is found, such acts might have represented isolated incidents and not the usual and ordinary relation existing between plaintiff and the establishments. A finding as to what was done 'at

times' is of such indefinite and uncertain meaning as to furnish little, if any, support for a conclusion predicated thereon. Furthermore, we are of the view that any acts of control 'at times' exercised by the establishments are relatively unimportant when compared with other facts found by the court and disclosed by plaintiff's contracts with the establishments, as well as with the usual manner in which the services of the orchestra were performed."

In *National Labor Relations Board v. Carroll, supra,* the First Circuit held that the fact that the owner might require the suspension of an employee of the independent contractor did not change the fact that the employee was the employee of the independent contractor and not of the owner.

Only where the two alleged employers occupy a joint or intercorporate relationship, can both be required to bargain with or be responsible for the labor relations of the employees.[12]

In *National Labor Relations Board v. Aluminum Tubular Corporation and American Flagpole Equipment Co., Inc.* (2 Cir. 1962), 299 F. 2d 595, the Court, in holding that common ownership and direction are not always sufficient to create a joint employer situation, stated, at page 599:

"Closer to the point but not close enough are cases where a parent or affiliate controlling another company's labor policies has been held for participating in or directing various unfair labor practices affecting the subservient firm's employees, e.g., N. L. R. B. v. Condenser Corp. of America, 128 F. 2d 67 (3 Cir. 1942), N. L. R. B. v. Somerset Classics, Inc., 193 F. 2d 613 (2 Cir.), cert. denied, Modern Mfg. Co. v. N. L. R. B., 344 U. S. 816, 73 S. Ct. 10, 97 L. Ed. 635 (1952). Any order to the controlling company with respect to bargaining

12. *National Labor Relations Board v. Hearst, et al.,* (9 Cir. 1939) 102 F. 2d 658.

in those cases, see also N. L. R. B. v. Swift & Co., 127 F. 2d 30 (6 Cir. 1942), was one directing it to cause the other firm, whose business was continuing, to bargain with that firm's own employees, and enjoining the controlling company from interfering with that process; the controlling company was in no instance forced to recognize the certified union as representing employees now its own."

Two very recent cases emphasize the Board's clear error of statutory construction in the present case. They are, *Site Oil Company v. National Labor Relations Board*, (8 Cir. 1963) 319 F. 2d 86, and *National Labor Relations Board v. Howard Johnson Company*, (3 Cir. 1963) 317 F. 2d 1. In *Site*, the Court found an independent contractor relationship to exist and not an employer-employee relationship, although the work was performed on the owner's premises and the owner retained substantial control over the performance of the work. The Eighth Circuit strongly relied upon the legislative history of the 1947 amendment to Section 2(3) of the Act. In *Howard Johnson*, that company contended that it was not the employer of the employees in the proposed unit, because substantial control had been retained by contract in the owner. The Board and the Court both found that Howard Johnson, rather than the owner, was the employer, primarily because the employees were hired, fired, paid by, and under the direction and supervision of Howard Johnson. In spite of the owner's substantial control over even the details of operation, the owner was found not to be an employer.

In the present case, after finding that Floors hires, pays, disciplines, transfers, promotes and discharges the porters, janitors and maids, the Board then made the findings upon which depends its conclusion that Greyhound is also an employer. These findings are (a) that Greyhound's terminal managers confer with Floors' supervisors in setting up work schedules and in determining the number of

employees required to meet those schedules; (b) Floors' supervisors may visit the Greyhound terminals on an irregular basis and on occasion may not appear for as much as two days at a time, and that the employees in the unit receive work instructions from Greyhound terminal officials; and (c) that Greyhound on one occasion prompted the discharge of a porter whom it felt to be an unsatisfactory employee (R. 10; this brief, *supra*, pp. 3-4). The cases hereinabove cited in this section of the brief clearly demonstrate that the elements of alleged "control", which the Board found Greyhound to possess, neither singly nor collectively permit a conclusion that Greyhound is an employer in the present case.

C. The Board Has No Jurisdiction Over Greyhound.

Inasmuch as the Board's jurisdiction derives solely from the Act, and inasmuch as the Board acted beyond the scope of that authority in the present case, the Board is without jurisdiction over Greyhound in the premises.

In *United Insurance Company of America v. National Labor Relations Board*, (7 Cir. 1962) 304 F. 2d 86, at page 89, the Court said:

> "In 1947, Congress amended the National Labor Relations Act so as to prohibit the National Labor Relations Board from assuming jurisdiction over independent contractors. It is conceded the amendment was intended by Congress to nullify the Supreme Court ruling in N. L. R. B. v. Hearst Publications, Inc., 322 U. S. 111, 64 S. Ct. 851, 88 L. Ed. 1170."

In *National Labor Relations Board v. Interior Enterprises, Inc.*, (9 Cir. 1961) 298 F. 2d 147, the Court held, at page 150, that where a respondent is not an employer within the meaning of the Act, the Board has no jurisdiction to enter an order against the respondent.

II.

The District Courts Have Jurisdiction to Enjoin an Administrative Act Beyond Statutory Authority.

By Section 24(8) of the Judicial Code,[13] Congress has vested the district courts with original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce. The present case is a civil action arising under an Act regulating commerce.[14]

The fundamental concept of the role of the courts in controversies involving the invalidity of an order or ruling of an administrative agency is expressed in *Stark v. Wickard*, 321 U. S. 288, 309, 310:

> "When Congress passes an Act empowering administrative agencies to carry on government activities, the power of those agencies is circumscribed by the authority granted. • • • The responsibility of determining the limits of statutory grants of authority in such instances is a judicial function entrusted to the courts by Congress by the statutes establishing courts and marking their jurisdiction. • • • But under Article 3, Congress established courts to adjudicate cases and controversies as to claims of infringement of individual rights whether by unlawful action of private persons or by the exertion of unauthorized administrative power."

Although an administrative officer may be authorized by statute to adjudicate a matter upon receipt of satisfactory evidence, "This does not authorize denial of a claim if the undisputed facts establish its validity as a matter of law, or preclude the courts from ascertaining whether the conceded facts do so establish it." *Dismuke v. United States*, 297 U. S. 167, 172, 173.

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13. 28 U. S. C. § 1337.

14. *Capital Service, Inc. v. National Labor Relations Board*, 347 U. S. 501, 504.

In *United States of America v. American Trucking Association, Inc.*, 310 U. S. 534, this Court stated, at page 542:

> "In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress."

And at page 544, this Court further stated:

> "The interpretation of the meaning of statutes, as applied to justiciable controversies, is exclusively a judicial function. This duty requires one body of public servants, the judges, to construe the meaning of what another body, the legislators, has said."

In *Deering Milliken, Inc. v. Johnston, Regional Director of the National Labor Relations Board*, (4 Cir. 1961) 295 F. 2d 856, the Court affirmed jurisdiction in the District Court to compel the Board to act expeditiously in an unfair labor practice case. At page 861, the Court stated:

> "The jurisdiction of the federal courts to enjoin acts of a federal administrative agency in excess of the agency's statutory authority was recognized as early as 1902. This recognition of the jurisdiction of the federal courts has carried through a long line of cases to the present time."

Judge Haynsworth cites many decisions of this Court, beginning with *Marbury v. Madison*, 5 U. S. 137.

In *Leedom v. Kyne*, 358 U. S. 184, 185, this Court stated:

> "The sole and narrow question presented is whether a Federal District Court has jurisdiction of an original suit to vacate that determination of the Board because made in excess of its powers." [15]

15. The Court found jurisdiction to exist. The *Kyne* case will be discussed more fully in a later portion of this brief.

As in *Kyne*, this Court approved the issuance of an injunction against representation proceedings in *McCulloch v. Sociedad Nacional*, 372 U. S. 10.

Neither this Court nor any United States Court of Appeals, subsequent to *Kyne*, has held that a district court has no jurisdiction to enjoin an administrative action beyond statutory authority. Thus, a district court has jurisdiction unless there is a compelling statutory basis limiting or proscribing such jurisdiction. The Board's brief contends that there are several reasons why the District Court does not have jurisdiction. This brief will meet each of such contentions.

A. *Congress Has Not Precluded Suits by Employers to Enjoin Representation Elections Where the Board Has Acted in Excess of Its Statutory Authority.*

Beginning with page 10 of the Board's brief is a recitation of the legislative history of the National Labor Relations Act with reference to review procedures provided by the Act. None of the legislative history recited sustains an argument that the Congress intended to inhibit the courts in exercising their statutory jurisdiction in an original action pursuant to Section 24(8) of the Judicial Code. What Congress intended was to prevent a *review* proceeding of orders of the Board in cases where the Board had jurisdiction and where disputed facts existed. Upon such a review as provided in Section 9(d) and Section 10(e) and (f) of the Act (P. A. 36-38), the matter to be reviewed is whether or not a Board order in an unfair labor practice proceeding is supported by substantial evidence.[16]

As the Court held in *Leedom v. Kyne*, 358 U. S. 184, an action of the Board clearly contrary to the statute may be enjoined. None of the legislative history of the review provisions of the Act reflects an intention on the part of

16. *Universal Camera Corporation v. National Labor Relations Board*, 340 U. S. 474; *National Labor Relations Board v. Walton Manufacturing Company*, 369 U. S. 404.

Congress to deprive the courts of such power, although the Congress perhaps could have done so by expressly limiting the existing statutory jurisdiction of the district courts.

In providing for statutory review in the Act, Congress did not intend to prohibit or delay intervention by the district courts in cases where it clearly appears from the face of the Board's own decision that the Act no longer applies and that the Board has no party or subject matter with reference to which it may proceed. The legislative history reflects that the Congressional purpose was to prevent delays by resort to the courts, where the Board still had before it a matter clearly within its jurisdiction. The present case falls outside of the category of such cases.

Nor do the decisions of this Court interpret the legislative history contrary to the contention of Greyhound. In *American Federation of Labor v. National Labor Relations Board*, 308 U. S. 401, an attempt was made to obtain direct review in a Circuit Court of Appeals. At pages 404, 405, the Court defined the question in that case as follows:

> "The single issue which we are now called on to decide is whether the certification by the Board is an 'order' which, by related provisions of the statute, is made reviewable upon petition to the Court of Appeals for the District or in an appropriate case to a circuit court of appeals. The question is distinct from another much argued at the Bar, whether petitioners are precluded by the provisions of the Wagner Act from maintaining an independent suit in a district court to set aside the Board's action because contrary to the statute, and because it inflicts on petitioners an actionable injury otherwise irreparable."

In the *American Federation of Labor* case, the question distinguished from the issue before the Court was specifically preserved, at page 412.

In *Inland Empire District Council, etc. v. Millis*, 325 U. S. 697, 700, this Court again preserved for a proper

case the determination of district court jurisdiction with regard to representation cases until a case should come before the Court showing that the Board has acted unlawfully.

Greyhound, in this case, presents precisely the sort of situation preserved by the Court for determination, and the District Court did have jurisdiction.

B. *Leedom v. Kyne Supports Jurisdiction in This Case.*

Independently of the decision of this Court in *Leedom v. Kyne*, 358 U. S. 184, the District Court had original jurisdiction because of the nature of the case. Nevertheless, it is clear that *Leedom v. Kyne* does support the present case.

Kyne and *Greyhound* are identical in at least the following respects: (1) the Board's action was contrary to statute; (2) the suits were not suits to review decisions of the Board made within its discretion and within its jurisdiction, but were original actions to vacate Board action without authority in law; (3) the Board attempted to exercise power specifically withheld; (4) the rights of the complaining parties were adversely affected by the Board's action; (5) the injunctions were obtained during the course of representation proceedings; and (6) the facts were undisputed.

The Board's argument completely disregards the fact that the District Court in the present case determined upon the basis of undisputed facts that the Board had no jurisdiction as to Greyhound. This presents even a stronger case for judicial intervention than was present in *Kyne*.

The Board has cited in footnote 18, beginning at page 17 of its brief, the reported cases which have considered the doctrine of *Kyne* as related to the particular fact before the respective courts. Every reported case, following *Kyne*, has specifically recognized jurisdiction in the district courts where the Board has clearly acted beyond the scope

of its statutory powers. In those cases finding that district court jurisdiction did not exist, the determination has been made upon the facts in each case, always disputed, that no action in excess of statutory powers was demonstrated.

In footnote 18, on page 18, the Board cites three court of appeals' decisions discussing the applicability of *Kyne*, in which the courts have held that district court jurisdiction did not exist. The first of these cases is *UNA Chapter v. National Mediation Board*, (D. C. Cir. 1961) 294 F. 2d 905. The court in that case followed the decision of this Court in *Switchmen's Union v. National Mediation Board*, 320 U. S. 297, and pointed out that the *Switchmen's Union* case had been distinguished by this Court in *Kyne*, in that the bargaining unit determined by the Mediation Board adhered to a prescribed statutory pattern. The second case is *Air Line Stewards and Stewardesses Assoc. v. National Mediation Board*, (D. C. Cir. 1961) 294 F. 2d 910. Here again, the Court distinguished *Kyne* on the basis of the distinction which this Court had made in *Kyne*. The third case is *WES Chapter v. National Mediation Board*, (D. C. Cir. 1962) 314 F. 2d 234. In that case, the Court held that the Board had not refused to act and had not acted in excess of its delegated powers, thus distinguishing *Kyne*.

An important consideration is the fact that in *Kyne* the Board admitted an act in excess of statutory authority, but insisted upon its historical position that, whatever the circumstances, the review provisions of Section 9(d) and Sections 10(e) and (f) were exclusive of all other types of judicial intervention.

1. This Suit Is Not Premature Because Its Purpose Is to Prevent an Election.

The Board's brief, beginning at page 20, argues that Greyhound's suit was premature because of a failure to exhaust administrative remedies. The Board's argument is self-defeating when considered as a whole, because the

over-all argument is that the District Court was without jurisdiction to entertain the suit either before or after election. The Board's basic argument is that the District Court never has jurisdiction and that the only method of attacking the validity of the Board's determination is to wait for a final order in an unfair labor practice proceeding.

The fact is that Greyhound's administrative remedies were completely exhausted before it brought the suit. The suit followed a hearing (and Greyhound does not attack the jurisdiction of the Board to conduct the hearing). After the hearing a *final* administrative determination had been made that Greyhound was an employer when, as a matter of law, the Board's own Decision and Direction of Election shows that Greyhound is not an employer. Neither the Act nor the rules of the Board provide for any administrative review of that determination. In *United Dairies, Inc.*, 144 N. L. R. B. No. 40 (August 22, 1963), the Board held:

> "The Board has long refused to permit relitigation in subsequent unfair labor practice proceedings of issues determined previously in representation proceedings."

Therefore, the entire argument that Greyhound's suit was premature is without foundation. Greyhound certainly cannot be compelled to exhaust remedies which do not exist.

In support of its contention that Greyhound must exhaust administrative remedies prior to filing its suit, the Board cites *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50-52; *Whitehouse v. Illinois Central R. R. Co.*, 349 U. S. 366, 373-374; and *Aircraft & Diesel Equipment Corp. v. Hirsch*, 331 U. S. 752, 767-768.

In the *Myers* case, both the employer and his employees sought to enjoin the holding of a hearing in an unfair labor practice case, on the ground that the provisions of the Act are not applicable to the employer. The action in the *Myers* case was brought prior to a hearing, without an opportunity on the part of the Board even to make findings of fact or a determination upon which the

Court could act. There was no claim by the employer that the statutory provisions or the rules of procedure prescribed for such hearings were illegal (303 U. S., at p. 47). The present case is clearly distinguishable from *Myers* in that, in the present case, the Board had already conducted the hearing and had made findings of fact which demonstrated that the Board was without jurisdiction. Relief was sought prior to any decision on the merits by the National Labor Relations Board (303 U. S., at p. 46). This Court held that the case was presented in the abstract and that there was no showing of invalidity.

Similarly, in *Whitehouse* (349 U. S., at p. 373): "Here relief is sought prior to any decision on the merits by the Board," and a ruling was sought ". . . in the abstract . . .".

In *Aircraft & Diesel*, the action was one for a declaratory judgment and injunction involving the constitutionality of the First and Second Renegotiation Acts. The Court found that equitable relief required something more than a mere suggestion of claim to bring into play judicial power, and that the plaintiff had an action at law to obtain greater relief than that sought. The case was not decided on jurisdictional lines, but purely on the basis of facts.

In *McCulloch v. Sociedad Nacional*, 372 U. S. 10, this Court approved a pre-election injunction of a Board Representation proceeding when it became clear that the Board did not have jurisdiction and that the Act had no application.

The doctrine of exhaustion of administrative remedies does not apply when the administrative agency has no jurisdiction. This Court clearly enunciated this principle in *Skinner & Eddy Corp. v. U. S.*, 249 U. S. 557. The case involved an ICC order permitting an increase in railroad rates for the shipment of steel from Pittsburgh to Seattle. At that time the Interstate Commerce Act Section 4 provided:

> "Whenever a carrier by railroad shall be in competition with a water route . . . and reduce the rates of carriage . . . to or from competitive points, it shall not be permitted to increase such rates unless after hearing by the Interstate Commerce Commission it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition."

The railroads had previously decreased competitive rates and the ICC had allegedly made no finding of changed conditions other than decreased water competition in permitting the new increase. The shippers sued to enjoin the rate increase and the government argued failure to exhaust administrative remedies. The court denied this claim by the government, stating:

> "The contention is that the Commission has exceeded its statutory powers; and that, hence the order is void. In such a case the courts have jurisdiction of suits to enjoin the enforcement of an order, even if the plaintiff has not attempted to secure redress in a proceeding before the Commission." 249 U. S. at 562.

The court went on to deny the plaintiffs' request for an injunction holding the ICC had acted within its powers.

The *Skinner & Eddy* decision was followed in *Varney v. Warehime*, (6 Cir. 1945) 147 F. 2d 238. The plaintiffs, milk handlers, sued to enjoin an order of the War Food Administrator claiming they were not within his jurisdiction under the federal statute. The administrator argued that the plaintiffs had failed to exhaust their administrative remedies. The court cited *Skinner & Eddy* with approval, and stated:

> "Failure to exhaust administrative remedies generally precludes resort to the courts (citations omitted). However, this is not an ironclad rule and it has no appli-

cation where the defect argued goes to the jurisdiction of the administrative agency." 147 F. 2d at 243.

The court, however, denied the plaintiffs' claim, holding they were properly controlled by the defendant.

In *Bernstein v. Herren*, (S. D. N. Y. 1955) 136 F. Supp. 493, affirmed (2 Cir. 1956), 234 F. 2d 434, similar language exists. Two army inductees sued to enjoin their commanding officers from considering their pre-induction records in giving them a dishonorable discharge. The court answered the government's argument claiming a failure to exhaust administrative remedies with the following statement:

> "a well-recognized exception to the requirement of the exhaustion of administrative remedies exists where the action of the administrative body is jurisdictionally defective, in violation of the plaintiffs' legal rights under statute." 136 F. Supp., at 496.

In *Schwebel v. Orrick*, (D. D. C. 1957) 153 F. Supp. 701, affirmed on other grounds (D. C. Cir. 1958), 251 F. 2d 919, a New York state court judge sued to enjoin the SEC from prosecuting a disciplinary proceeding against him for his allegedly unethical conduct before that commission. The government again argued that the plaintiff had failed to exhaust his administrative remedies. The court, which later held the disciplinary proceeding to be proper, denied this contention with the following language:

> "It is elementary law that as a general rule administrative remedies must first be exhausted before one aggrieved is entitled to court review, but this wise rule is not without exceptions necessary to preserve the fundamental rights of the litigant or to prevent a violation of express statutory limitations placed by the Congress upon the powers or actions of the administrative body." 153 F. Supp., at 703-04.

The court further stated:

> "Counsel for the government concedes that cases where it is clearly apparent that the administrative body is attempting to act entirely outside its lawful jurisdiction would fall within the exception to the general rule." 153 F. Supp., at 704.

In the present case, Greyhound acted as soon as the invalidity of the Board's determination was evident, and the action was simply one to terminate all further proceedings as to Greyhound, because the Act under admitted facts did not apply to Greyhound in the premises.

2. Remedy Is No Less Available to Greyhound Than to a Union.

The true issue in this case is the jurisdiction of district courts to stop the Board from proceeding beyond the scope of its jurisdiction. The Board argues, beginning at page 23 of its brief, that there is a difference between a district court's right to act at the suit of an employer, as opposed to a suit brought by a union. The Board's argument overlooks the fact that in the present case there was no jurisdiction in the Board whatsoever. In *Leedom v. Kyne*, 358 U. S. 184, the Court made no such distinction as that argued by the Board. As a matter of fact, the union in *Kyne* had just as great an opportunity to review the Board's determination under the review provisions of the Act as does Greyhound in the instant case. It is interesting to note that the minority justices in *Kyne* complained that the result of the majority's decision would be that "Both union and management would be able to use the tactic of litigation to delay the initiation of collective bargaining when it suits their purposes," at page 196.

In arguing the case before this Court in *Leedom v. Kyne*, the Board took a position contradictory to its pres-

ent position. The Board's argument is stated in footnote 12, at pages 22-23, of the Board's brief in *Kyne*.[17]

A further commentary upon this subject is found at page 219, Volume 73, Number 1, Harvard Law Review, November 1959, wherein the author discusses the *Kyne* case:

17. Footnote 12 of that brief is as follows: "The only conceivable way that a 'losing' union could obtain review under Section 9(d) of a certification issued to another union is by violating Section 8(b)(4)(C) of the amended Act. That is, were the 'losing' union to picket for recognition notwithstanding the certification, it would subject itself to an 8(b)(4)(C) charge. In the unfair-labor-practice proceeding, the union could then proceed to contest the validity of the underlying certification, and, should the Board overrule this contention and issue an unfair-labor-practice order; this order, together with the underlying certification, could be brought before the Court of Appeals pursuant to Section 9(d). Cf., however, *Meat & Provision Drivers Union*, 115 N. L. R. B. 890, 891, 901; *Parks v. Atlanta Printing Pressmen & Assistant's Union*, 243 F. 2d 284 (C. A. 5), certiorari denied, 354 U. S. 937; *Tungsten Mining Corp. v. District 50, etc.*, 242 F. 2d 84 (C. A. 4), certiorari denied, 355 U. S. 821.

"The union here, of course, was certified, so that it was in a better position to obtain review of the certification under Section 9(d). Just as Section 8(a)(5) makes it an unfair labor practice for an employer to refuse to bargain with the union which is the representative of his employees, Section 8(b)(3) makes it an unfair labor practice for that union to refuse to bargain with the employer. Accordingly, the Engineers Association, contending that the Board's certification of a combined unit of professional and nonprofessional employees was erroneous, could insist that Westinghouse bargain with it solely on behalf of the professional employees. The Engineers Association would thus subject itself to a charge, filed either by the employer or the nonprofessional employees in the unit, that it had refused to bargain as required by Section 8(b)(3), and, should the Board so find and issue an order requiring the Engineers Association to bargain for all of the employees in the certified unit, the Engineers Association could obtain review of that order and the underlying certification in the Court of Appeals, pursuant to Sections 9(d) and 10(e) and (f) of the Act, just as the employer could if he were contesting the certification. Cf. *Douds v. International Longshoremen's Association*, 147 F. Supp. 103, 109, 110-112 (S. D. N. Y.), affirmed, 241 F. 2d 278, 282 (C. A. 2). However, the court below concluded (p. 8, n. 4, *supra*; R. 39) that this procedure was inadequate because it was not likely that either the employer or the nine nonprofessionals would file unfair-labor-practice charges if the union refused to bargain for the latter. We believe that the Court's assumption is unwarranted, particularly insofar as the filing of charges by the nine nonprofessionals is concerned."

"Also, a recent lower-court decision has found the present case inapplicable to employers, on the ground that they have an effective means of obtaining review in the refusal-to-bargain procedure. There is some indication in the present case, however, that the Supreme Court does not consider that procedure adequate. The majority opinion emphasizes that the professional employees had no means of review 'within their control.' But since the association had won the certification election, it could have obtained review by bargaining on behalf of the professional employees alone, and ignoring the unit certified by the NLRB. This would have subjected it to a section 8(b)(3) unfair-labor-practice charge, which would bring the same opportunity for review under section 10(f) as is available to the employer. While this procedure was beyond the control of the association, inasmuch as it depended upon the filing of an unfair-labor-practice charge, the parallel procedure available to the employer is subject to the same defect. It is true that a union with which an employer refuses to bargain is more likely to file a charge than is either the employer with whom the union refuses to bargain on behalf of the entire unit certified or the employee whom the union refuses to represent; but this distinction does not go to the availability of 'control' over the review procedure."

In *Empresa Hondurena de Vapores, S. A. v. McLeod*, (2 Cir. 1962) 300 F. 2d 222, the Board made both contentions that are made here: (1) that the action was premature as being one to enjoin an election, and (2) that the employer had no right to bring the action. The Second Circuit rejected both contentions and with reference to the fact that the action was brought by an employer, pointed out: ". . . the possibility of the plaintiff's precipitating an unfair labor practice charge was present in *Leedom v. Kyne* itself; yet the court evidently did not deem this

fatal." When the *Empresa* case was brought to this Court, it was consolidated for the purposes of opinion with two cases wherein unions were plaintiffs, and the Court decided all of the issues in *McCulloch v. Sociedad Nacional*, 372 U. S. 10. The Board had control of all three cases as they were presented to this Court, and chose to raise the jurisdictional question only in the employer's case. Thus, this Court found it unnecessary to rule upon the jurisdictional question in *Empresa*. Had the jurisdictional question been raised in *Sociedad*, it was obvious that the union had a remedy pursuant to the review provisions of the Act, because it easily could have induced a charge against it by committing an unfair labor practice.

At least since the enactment of the Taft-Hartley Act in 1947, making unions subject to unfair labor practices as well as employers, there is no credible basis for distinguishing between the rights of an employer and the rights of a union to obtain judicial relief where statutory rights have been violated.

The Board takes the further position that Greyhound should have waited for the results of an election before seeking judicial relief, because the matter would become moot if the union lost the election. The determination that Greyhound is an employer in the present case could never become moot until that determination was vacated by a court. For instance, if the union lost the election, the same union or another union could, at the end of a twelve-months' period, petition for another election, and obtain another direction of election.[18] In this event, the Board could rely upon its determination in the present case that Greyhound is an employer, and the only issue subject to Section 10 review would be the propriety of the Board's reliance upon a prior determination.[19]

18. Section 9(c)(3) provides in part: "No election shall be directed in any bargaining unit or any subdivision within which in the preceding twelve month period a valid election shall have been held."

19. *Boyles Galvanizing Company of Colorado v. Waers, Regional Director*, (10 Cir. 1961) 291 F. 2d 791.

Again referring to the inadequacy of Section 10 review proceedings, it is noted that the event which gave rise to the litigation between Greyhound and the Union over the Greyhound-Floors contract (R. 35-41) was the Union's threat to initiate a system-wide strike against Greyhound if the contract were put into effect.[20] In the face of the District Court's determination that there is no employer-employee relationship between Greyhound and Floors' employees, a strike or picketing directed against Greyhound would constitute an unfair labor practice on the part of the Union. (See footnote 24(a), *infra*, page 35.) If the decision of the District Court were reversed, the Union could picket even before an election, unless Greyhound can prove a good faith doubt as to majority representation.[21]

Moreover, if, for the purpose of collective bargaining, Greyhound be made a joint-employer with Floors, the mutually beneficial contract between Greyhound and Floors will have no basis for continued existence.[22]

Should the employer be made to follow the tortuous and uncertain course of proceeding with the election, a refusal to bargain, a *possible* unfair labor practice charge for refusal to bargain, a hearing on those charges, and an enforcement proceeding by the Board and/or a petition for review by the employer in a circuit court of appeals, Greyhound could still be required to bargain with employees not its own prior to any judicial review. This is so, because under

20. Paragraph 5 of Judge Simpson's findings of fact in that case states that the Union gave notice to Greyhound that if the contract were put into effect "a strike of the operators and terminal employees would occur, forcing a suspension of the company's entire motor bus operations" (R. 38). Paragraph 6 of the same findings is "The Union advised the company that it deemed the proposed contract with Floors, Inc., in violation of the agreement of August 19, 1953, and that the threat of a general strike against the company's operation would continue and a strike occur if that contract were activated" (R. 39).

21. *National Labor Relations Board v. Knickerbocker Plastic Company, Inc.*, (9 Cir. 1955) 218 F. 2d 917.

22. Brief of Floors, Inc., as amicus curiae, pp. 26-27.

Section 10(j) of the Act[23] the Board could bring an injunction proceeding in a district court for a temporary restraining order pending appeal, requiring Greyhound to bargain. In such an event, the injunction should issue upon probable cause and the probable cause would certainly exist, because Greyhound would have openly declined to bargain under the circumstances.[24]

The equity jurisdiction of the District Court was properly invoked. Inadequacy of any other remedy and the threat of irreparable harm and damage to Greyhound is demonstrated by the real threat of a system-wide strike, of ruinous picketing, of unwarranted delay, of compulsory bargaining prior to any other judicial determination, and of the probability of a destruction of mutually profitable contract relationships, all as demonstrated in this portion of the brief. Among many other findings of the District Court in the present case, warranting the intervention of equity, is this most pertinent finding by the District Court (R. 56):

> "Assuming, but not admitting, that the Union will file an unfair labor charge upon the plaintiff's refusal to bargain, the determination of the unfair labor charge by the Board, and the enforcement proceeding, are known to be prolonged and very time-consuming;

23, *Infra*, p. 41.

24. The Board has obtained temporary injunctions, based upon probable cause, to compel collective bargaining against a union, *Douds v. International Longshoremen's Association*, (2 Cir. 1957) 241 F. 2d 278, as well as against an employer, *Compton v. Sea-Land Service, Inc.*, No. 469-62, February 20, 1963 (D. C. Puerto Rico), 53 LRRM 2016. In *LeBus v. Maxwell, etc.*, No. 9510 (D. C. W. D. La.), June 27, 1963, 54 LRRM 2122, the Court granted a Section 10(j) injunction against an employer, which was technically refusing to bargain pending a court of appeals review. The Court held that "there is neither statutory nor decisional support for the proposition that an employer may legally withhold recognition from the union until some uncertain future date, when all administrative proceedings have been exhausted, court review obtained, writs acted upon, and an enforcement order obtained," at 54 LRRM 2128.

and picketing of the plaintiff by the Union while the case is being decided by the Court of Appeals could mean complete economic ruin to the plaintiff. Even if the plaintiff would ultimately prevail, its victory would, indeed, be a pyrrhic one. In the light of the foregoing, one is compelled to conclude that the said method of review, allegedly available to the plaintiff, is not an adequate remedy."

At page 26, footnote 30, of the Board's brief, two cases are cited holding that *Kyne* can never apply to suits by employers. The first case is *Leedom v. International Brotherhood of Electrical Workers*, (D. C. Cir. 1960) 278 F. 2d 237. This was an action by a union and an employer to enjoin the Board from conducting an election. The issue before the Court was whether or not the Board had authority retroactively to apply a new "contract bar" policy, which was an internal policy in no way controlled by statute. The Court cited *Kyne*, and stated, at page 239:

"To obtain review of such determination in an original equity suit in the District Court, 'there must be a showing "of unlawful action by the Board and resulting injury . . . by way of departure from statutory requirements or from those of due process" '."

The other case is *Atlas Life Insurance Company v. Leedom*, (D. C. Cir. 1960) 284 F. 2d 231. In the *Atlas* case, the employer sought an injunction to void certification of a union on the ground that no hearing had been held to test the compliance by the union with the non-communist affidavit requirements of the Act. In affirming a dismissal by the District Court, the Court of Appeals held:

"In directing a representation election, the National Labor Relations Board noted that the union had complied with these requirements."

The Court specifically referred to and distinguished *Leedom v. Kyne*.

The Board's brief also argues, in footnote 30, that a certification would be followed by a refusal to bargain charge, rather than by a strike. There is no basis for the Board's speculation in this matter. The Board further argues that there is no reason to believe that District Court review reduces rather than increases the danger of a strike or picketing by the union, and says that despite the injunction, the union remains free to strike or picket. The Union is not free to strike or picket Greyhound where Greyhound is not the employer. Section 7 of the Act does not confer the right to such collective activities, because the strike could not be for the purposes of collective bargaining with respect to one who could not, as a matter of law, bargain with the Union. A strike or picketing, under such circumstances, would be for the purpose of causing Greyhound to cease doing business with Floors, and would thus be a violation of Section 8(b)(4)(B) of the Act,[24a] which a district court may enjoin under Section 10(l) of the Act (*infra*, page 41).

24a. "It shall be an unfair labor practice for a labor organization or its agents—

. . .

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

. . .

(B) forcing or requiring any person . . . to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9."

3. The Board Has Made a Plain Error of Statutory Construction.

This argument is thoroughly discussed in part I of this brief, *supra*, pp. 10-17. The Board argues that, as distinguished from *Leedom v. Kyne*, the present case involves an error attributed to the Board in evaluating the particular facts of this case. District Court jurisdiction was found appropriate in *Kyne*, where no factual dispute was involved, because the Board had made an error of statutory construction. In the present case, that is precisely what the Board did, and the error was plainly contrary to the limitations placed upon the Board by the Congress by the 1947 amendment to Section 2(3) (see legislative history, *supra*, part I, this brief). The Board argues, at pages 28 and 29 of its brief, that a person is a joint employer of particular employees when he possesses power to control the terms and conditions of their employment. In support of this argument, the Board first cites *National Labor Relations Board v. Condenser Corporation*, (3 Cir. 1942) 128 F. 2d 67. In that case, the Board found, and the Court concurred, that the two corporations were affiliated through common ownership of their stock and that one was the wholly-owned subsidiary of the other. There was substantial evidence that both corporations maintained direct control of the labor relations policy and activities. Moreover, *Condenser* was decided five years prior to the 1947 amendment to Section 2(3) of the Act.

The Board next cites *National Labor Relations Board v. Long Lake Lumber Co.*, (9 Cir. 1943) 138 F. 2d 363. In that case, the Court found that there was sufficient evidence to indicate a domination of one employer over another, inconsistent with an independent contractor relationship. In deciding that the two companies were joint employers, the Court expressly rejected the common-law test to determine whether or not an independent contractor relationship existed. This case preceded the 1947 amendment to Section 2(3) of the Act by some four years, and

followed the reasoning in *National Labor Relations Board v. Hearst Publications, Inc.*, 322 U. S. 111, which case was expressly nullified by the Congress.[25]

In support of the same argument, the Board cites *West Texas Utilities Co.*, 108 NLRB 407, enforced, 218 F. 2d 824. That case did not involve a question of representation or bargaining, but involved the discrimination provisions of the Act (Sections 8(a)(1) and (3)). The Board found that there was a contract between one employer and another by which the dominant employer had delegated to another the right to remove employees from the work. The Board held, in part: "Normally, under such an arrangement, responsibility for the hire, pay and discharge of employees on the job would be vested in Southwest," but the Court found that the right to discharge had been expressly delegated by contract so that both employers were necessarily responsible for a wrongful discharge.

In *Macy's San Francisco & Seligman*, 120 NLRB 69, two employers were held to be joint employers where the lessee had ceded its bargaining rights to the lessor, who had in turn ceded those rights to an employers' council, and employment as well as termination of employment was subject to clearance through the lessor. This case was not judicially reviewed.

The Board also cites, in footnote 33 of its brief, *Panther Coal Company*, 128 NLRB 409. This determination, not judicially reviewed, turned upon the fact that two of the companies involved were in all respects an integral part of the third, rather than independent contractors, a fact which was stipulated to by the employer and the union.

At page 29 of the Board's brief, it is insisted that the question of statutory construction in the present case was a mixed question of law and fact, citing *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U. S. 504. The *O'Leary* case is a complex case involving compensation under the Longshore-

25. *Supra*, pp. 10, 11.

men's and Harbor Workers' Compensation Act of 1927, and is completely inapplicable to the question presented.

However, the fact that only a question of law exists in the present case is demonstrated by this Court's opinion in *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94, involving an action by the Postmaster General in excess of his statutory powers. The Court, at page 109, held that the interpretation of the Postmaster General was ". . . a pure mistake of law on his part, because the facts, being conceded, whether they amounted to a violation of the statutes would be a legal question, and not a question of fact." The Court then held, at page 110, that a clear mistake of law, applied to admitted facts, gave the Court power in a proper proceeding to grant relief.

In *Site Oil Company v. National Labor Relations Board*, (8 Cir. 1963) 319 F. 2d 86, at page 90, the Court stated:

> "If the facts before the Board were such that all reasonable minds must honestly draw the conclusion that the status of the lessees was that of independent contractors, the question would, of course, become a question of law rather than one of fact."

The *Site* case was one wherein the Court found an absence of an employer-employee relationship, because of the 1947 amendment to Section 2(3) of the Act.

The Board's clear error of statutory construction was in finding Greyhound to be an employer with respect to employees not its own, where the Board's findings of fact clearly show a complete absence in Greyhound of the right to control those elements of the employment relationship necessary to collective bargaining.

The instant case did not require the District Court to make any determination of fact reserved by the Act to the Board and the Courts of Appeal. As the District Court found (R. 58), there were no issues of fact in the instant case.

CONCLUSION.

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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September, 1963.

APPENDIX.

Section 10(j) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U. S. C. 160(j)):

> "The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any district court of the United States (including the District Court of the United States for the District of Columbia), within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper."

Section 10(l) of the National Labor Relations Act, as amended (29 U. S. C. 160(l)):

> "Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph 4(A), (B), or (C) of section 158(b) of this title, or section 158(e) of this title or section 158(b)(7) of this title, the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of

the Board, petition any United States district court within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law. . . ."

Relevant provision of the Judicial Code (62 Stat. 931, 28 U. S. C. 1337):

"The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies. (June 25, 1948, c. 646, § 1, 62 Stat. 931.)"